

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

~~79-544~~
No.

PENNSYLVANIA ELECTRIC COMPANY,

METROPOLITAN EDISON COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
BOROUGHS OF KUTZTOWN, GOLDSBORO, &
LEWISBERRY, PENNSYLVANIA; &
ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Intervenors

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

JAMES B. LIBERMAN
LEONARD W. BELTER
WILLIAM A. KEHOE III
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9800

Counsel for Petitioners

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INDEX

	<u>Page</u>
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATUTORY PROVISIONS AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Background	3
B. Commission Proceedings	4
C. Decisions Below	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8
APPENDIX A—Metropolitan Edison Company, FPC Electric Tariff, Original Volume No. 1, Original Sheet No. 18, Record, vol. 2, at 477, <i>Public Service Co. of New Hampshire v. FERC</i>, No. 77-1592 (D.C. Cir. May 3, 1979), <i>petition for cert. filed by Public Service Co. of New Hampshire</i>, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169)	1a
APPENDIX B—Pennsylvania Electric Company, FPC Electric Tariff, Original Vol. No. 1, Original Sheet No. 16, Record, vol. 2, at 572, <i>Public Service Co. of New Hampshire, supra</i>	3a
APPENDIX C—<i>Public Service Co. of New Hampshire v. FERC</i>, No. 78-1329 (D.C. Cir., filed July 3, 1979), <i>denying rehearing</i> No. 77-1592 (D.C. Cir. filed May 15, 1979)	5a
APPENDIX D—<i>Metropolitan Edison Co.</i>, Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket Nos. ER76-209 & ER76-492 (FERC Dec. 19, 1977), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC, supra</i>	6a

APPENDIX E— <i>Metropolitan Edison Co.</i> , Order Denying Application for Rehearing and Motion for Stay, Docket Nos. ER76-209 & ER76-492 (FERC Feb. 13, 1978), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC, supra</i>	9a
APPENDIX F— <i>Pennsylvania Electric Co.</i> , Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket No. ER76-607 (FERC Dec. 19, 1977), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC, supra</i>	12a
APPENDIX G— <i>Pennsylvania Electric Co.</i> , Order Denying Application for Rehearing and Motion for Stay, Docket No. ER76-607 (FERC Feb. 13, 1978), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC, supra</i>	26a

CITATIONS

	<u>Page</u>
COURT CASES:	
<i>Jersey Central Power & Light Co. v. FERC</i> , 589 F.2d 142 (3d Cir. 1978), <i>petition for cert. filed</i> , 47 U.S.L.W. 3749 (U.S. May 15, 1979) (No. 78-1665)	6
<i>Public Service Co. of New Hampshire v. FERC</i> , No. 77-1592 (D.C. Cir. May 3, 1979), <i>petition for cert. filed by Public Service Co. of New Hampshire</i> , 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169) <i>passim</i>	
COMMISSION CASES:	
<i>Metropolitan Edison Co.</i> , Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket Nos. ER76-209 & ER76-492 (FERC Dec. 19, 1977), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC</i> , No. 77-1592 (D.C. Cir. May 3, 1979)	2
<i>Metropolitan Edison Co.</i> , Order Denying Application for Rehearing and Motion for Stay, Docket Nos. ER76-209 & ER76-492 (FERC Feb. 13, 1978), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC, supra</i>	2
<i>Metropolitan Edison Co.</i> , Order Accepting for Filing and Suspending Proposed Fuel Adjustment Surcharge, Denying Waiver Establishing Procedures, Consolidating Dockets, Denying Motions and Granting Interventions, Docket Nos. ER76-492 & ER76-209 (FERC Feb. 27, 1976)	5
<i>Pennsylvania Electric Co.</i> , Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket No. ER-76-607 (FERC Dec. 19, 1977), <i>aff'd sub nom. Public Service Co. of New Hampshire v. FERC, supra</i>	2, 7
<i>Pennsylvania Electric Co.</i> , Order Denying Application for Rehearing and Motion for Stay, Docket No. ER76-607 (FERC Feb. 13, 1978), <i>aff'd sub nom. Public Service of New Hampshire v. FERC, supra</i>	2

	<u>Page</u>
<i>Pennsylvania Electric Co.</i> , Order Accepting for Filing and Suspending Proposed Fuel Adjustment Clauses and Establishing Procedures, Docket No. ER76-607 (FERC May 7, 1976)	5
Opinion No. 790, <i>Public Service Co. of New Hampshire</i> 19 P.U.R. 4th 210 (FPC, 1977), aff'd No. 77-1592 (D.C. Cir. May 3, 1979)	5
INITIAL DECISIONS:	
<i>Metropolitan Edison Co.</i> , Initial Decision on Fuel Adjustment Surcharge Proposal, Docket Nos. ER76-209 & ER76-492 (FPC Feb. 15, 1977).	5
<i>Pennsylvania Electric Co.</i> , Initial Decision on Proposed Surcharge to Recover Fuel Costs, Docket No. ER76-607 (FPC Mar. 22, 1977).	5
PETITIONS:	
Petition for Certiorari, <i>Jersey Central Power & Light Co. v. FERC</i> , 48 U.S.L.W. 3833 (U.S. May 15, 1979) (No. 78-1665)	3, 6
Petition for Certiorari of Public Service Co. of New Hampshire, <i>Public Service Co. of New Hampshire v. FERC</i> , 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169)	6

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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CIRCUIT**

Petitioners Pennsylvania Electric Company and Metropolitan Edison Company respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 3, 1979.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor its order (App. A, p. 1a, *infra*) denying rehearing have been reported. The opinion has been filed as part of the Appendix to a pending petition for certiorari to review the decision below. Petition for Certiorari of Public Service Company of New Hampshire, *Public Service Co. of New Hampshire v. FERC*, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169). The Federal Energy Regulatory Commission issued the following four orders:

- (1) *Metropolitan Edison Co.*, Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket Nos. ER76-209 & ER76-492 (FERC Dec. 19, 1977) (App. D., pp. 6a-8a, *infra*);
- (2) *Metropolitan Edison Co.*, Order Denying Application for Rehearing and Motion for Stay, Docket Nos. ER76-209 & ER76-492 (FERC Feb. 13, 1978) (App. E, pp. 9a-11a, *infra*);
- (3) *Pennsylvania Electric Co.*, Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket No. ER76-607 (FERC Dec. 19, 1977) (App. F., pp. 12a-25a, *infra*); and
- (4) *Pennsylvania Electric Co.*, Order Denying Application for Rehearing and Motion for Stay, Docket No. ER76-607 (FERC Feb. 13, 1978) (App. G, pp. 26a-28a, *infra*).

None of these orders have been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 3, 1979. A timely petition for rehearing was denied on July 3, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. §825l(b).

QUESTIONS PRESENTED

Whether, in view of its lack of authority to issue reparation orders, the Federal Energy Regulatory Commission has the power to approve a just and reasonable electric utility tariff provision which seeks to recover for monies spent to purchase fuel consumed in generating electricity, where the monies were spent before the tariff's effective date, but the fuel costs to be recovered are properly allocated as costs to billing months occurring after the tariff's effective date?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves Sections 201(a), 205(a), 205(b), 205(c), 205(d), 205(e), and 313(b) of the Federal Power Act, 16 U.S.C. §§824(a), 824d(a), 824d(b), 824d(c), 824d(d), 824d(e), & 825l(b) (1976), and 28 U.S.C. §1254(1) (1976). Also involved is Section 35.22(e)(3) of the Federal Energy Regulatory Commission's Rules. 18 C.F.R. §35.22(e)(3). These provisions are before this Court as Appendices J and K to the Petition for Certiorari, *Jersey Central Power & Light Co. v. FERC*, 48 U.S.L.W. 3833 (U.S. May 3, 1979) (No. 78-1665).

STATEMENT OF CASE

A. Background

This case arises from the Federal Energy Regulatory Commission's ("FERC" or "Commission") rejection of two electric utility tariff provisions under which Pennsylvania Electric Company ("Penelec") and Metropolitan Edison Company ("Met Ed") are attempting to obtain \$1,418,729 and \$519,726 from their respective wholesale customers in compensation for fuel consumed to provide them with electric power. The provisions at issue were temporary surcharges designed to

recover prudently incurred fuel costs. The need for recovery provisions stemmed from petitioners' decision to employ updated bases in their new fuel clauses and corresponding updates to the fuel costs recovered in the new base energy charges¹ when the 1976 clauses were filed.² By use of the surcharges, petitioners sought to recover fuel costs which, under traditional accrual accounting principles, were not recorded as expenses until after the effective date of the new tariffs, even though the cash to purchase the fuel had been spent before that date. The superseded fuel adjustment clauses would have collected these costs had the petitioners not updated the base in the new fuel clauses.

B. Commission Proceedings

By orders dated February 27, 1976, and May 7, 1976, the Commission accepted the surcharge provisions for filing, sus-

¹ Like most electric utility tariffs, the companies' tariffs assess a demand charge to recover relatively fixed, capacity-related costs and an energy charge to recover the variable costs of supplying electricity. Each company's energy charge has two components: a predetermined base charge for each kilowatt-hour of electricity consumed during the billing month and a fuel adjustment charge, designed in conjunction with the base energy charge, to match revenues recovered with actual fuel costs. Under the companies' fuel adjustment clauses, each customer's monthly bill is raised or lowered by the product of the number of kilowatt hours of electricity used during the billing month and the difference between the average cost of all fuel Penelec or Met Ed consumed during the three month period ending two months prior to the billing month and a preset base fuel cost. The surcharge provisions would impose for periods of approximately ten to twelve months beginning on the effective date of the 1976 tariffs additional charges of between 1.500 and 2.700 mills per kilowatt hour of consumption, subject to adjustments for delivery voltage losses and gross receipts taxes. (App. A, pp. 1a-2a, *infra*; App. B, pp. 3a-4a, *infra*).

² The preceding clauses, which were superseded when the 1976 clauses became effective, are printed in the appendix to the decision below. *Public Service Co. of New Hampshire v. FERC*, No. 77-1592, Slip. Op. at 41-44 (D.C. Cir. May 3, 1979), *petition for cert. filed by Public Service Co. of New Hampshire*, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169).

pended them, and ordered hearings to examine their lawfulness.³ As a result of these orders, Met Ed's surcharge became effective subject to refund on February 29, 1976, and Penelec's surcharge became effective subject to refund on October 8, 1976. At the ensuing hearings, both petitioners attempted to prove that their surcharge provisions were just and reasonable.

The presiding law judges' initial decisions,⁴ the Commission's orders affirming those decisions, (App. D, p. 6a, *infra*; App. F, p. 12a, *infra*) and the Commission's orders denying rehearing, (App. E, p. 9a, *infra*; App. G, p. 26a, *infra*), all rejected petitioners' surcharge provisions. While the presiding law judges phrased their holdings in terms of the provisions' justness and reasonableness,⁵ the Commission did not reach such questions. Instead the Commission grounded its decisions on the interpretation accorded the rule against retroactive ratemaking in Opinion No. 790, *Public Service Co. of New Hampshire*, 19 P.U.R. 4th 210 (FPC, 1977), *aff'd* No. 77-1592 (D.C. Cir. May 3, 1979). (See App. D, p. 7a, *infra*; App. F, pp. 17a-22a, *infra*).

C. Decisions Below

The United States Court of Appeals for the District of Columbia Circuit affirmed on the basis of its agreement with

³ *Metropolitan Edison Co., Order Accepting for Filing and Suspending Proposed Fuel Adjustment Surcharge, Denying Waiver, Establishing Procedures, Consolidating Dockets, Denying Motions and Granting Interventions*, Docket Nos. ER76-492 & ER76-209 (FERC Feb. 27, 1976); *Pennsylvania Electric Co., Order Accepting for Filing and Suspending Proposed Fuel Adjustment Clause and Establishing Procedures*, Docket No. ER76-607 (FERC May 7, 1976).

⁴ *Metropolitan Edison Co., Initial Decision on Fuel Adjustment Surcharge Proposal*, Docket Nos. ER76-209 & ER76-492 (FPC Feb. 15, 1977) [hereinafter *Met Ed Initial Decision*]; *Pennsylvania Electric Co., Initial Decision on Proposed Surcharge to Recover Fuel Costs*, Docket No. ER76-607 (FPC Mar. 22, 1977) [hereinafter *Penelec Initial Decision*].

⁵ *Met Ed Initial Decision*, *supra* at 7; *Penelec Initial Decision*, *supra* at 8.

the Commission's interpretation of petitioners' superseded fuel adjustment clauses and the belief that approval of the surcharge provisions therefore would constitute impermissible retroactive ratemaking. *Public Service Co. of New Hampshire v. FERC*, No. 77-1592 (D.C. Cir. May 3, 1979), *petition for cert. filed by Public Service Company of New Hampshire*, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169).⁶ Penelec and Met Ed's subsequent petition for rehearing was denied without opinion. (App. C, p. 5a, *infra*).

REASONS FOR GRANTING THE WRIT

This Court has before it in No. 78-1185 a petition for certiorari filed by Jersey Central Power & Light Company to review the decision of the United States Court of Appeals for the Third Circuit in *Jersey Central Power & Light Co. v. FERC*, 589 F.2d 142 (3d Cir. 1978), *petition for cert. filed*, 48 U.S.L.W. 3833 (U.S. May 15, 1979)(No. 78-1665). Also pending before this Court is a petition for certiorari in No. 79-169 filed by Public Service Company of New Hampshire to review the decision below. Penelec and Met Ed believe that these petitions establish (a) the existence of a substantial conflict among the Circuit Courts of Appeals with regard to FERC's authority to determine whether electric utility tariff provisions are just and reasonable and (b) the unduly expansive nature of the interpretation accorded the rule against retroactive ratemaking by the Commission and by the United States Courts of Appeals for the Third, Fourth, and D.C. Circuits. Petitioners also believe that the petitions demonstrate the continuing importance of the questions raised by that interpretation to the administration of the Federal Power Act.

⁶ By orders issued April 13, 1978, and June 6, 1978, the Court of Appeals had consolidated Met Ed's and Penelec's appeals with those pending in Appalachian Power Co., Docket No. ER77-325 (FPC June 30, 1977) and in Public Service Co. of New Hampshire, 19 PUR Co. 4th 210 (FPC 1977).

In view of these pending petitions, Penelec and Met Ed desire only to focus the Court's attention on the nature of the Commission's actions in this case. From the outset, petitioners have contended that the surcharge provisions were designed to recover fuel costs which would have been recovered had the superseded fuel adjustment clauses remained in effect. [R. 429, 473, 514, 568, 575, 580]. The Commission did not reject this position. As a result, FERC could not have rejected the surcharge provisions on the ground that they attempted to impose additional charges not recoverable under the superseded fuel adjustment clauses. Because of this, it is apparent that, under the Commission's formulation of the rule against retroactive ratemaking, petitioners are not attempting to increase rates retroactively "to make up for deficiencies in [the] formula [in their superseded rate schedules]." *Pennsylvania Electric Co., Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket No. ER76-607* (FERC Dec. 19, 1977). (App. F, p. 22a, *infra*). Met Ed and Penelec submit that this and other factors warrant a decision by this Court on the question whether FERC should be required to assess the justness and reasonableness of the various electric utility tariff provisions at issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the D.C. Circuit.

Respectfully submitted,

JAMES B. LIBERMAN
LEONARD W. BELTER
WILLIAM A. KEHOE III
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9800

Counsel for Petitioner

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